

cooperative. As a consequence, Taxpayer files its federal income tax return on Form 1120-C, U.S. Income Tax Return for Cooperative Associations. Taxpayer files its return on the basis of a calendar year. Taxpayer's overall method of accounting for federal income tax purposes is the accrual basis.

Taxpayer is the c cooperative in the United States. It was formed in a by the consolidation of c marketing cooperatives. Taxpayer markets its members' b both in a form and in processed form. Taxpayer is primarily engaged through its a division in the business of procuring, processing and distributing b into the a channel at the highest competitive price. In addition, Taxpayer processes b into value-added c products (including

c) with shelf lives longer than a. These c products are sold to food processors and institutional, wholesale and retail customers. Taxpayer coordinates the flow of its b supply into the channel it believes will provide the best overall economic return for members. In addition to a number of manufacturing plants, Taxpayer has an extensive network of affiliated processors of c products.

Taxpayer's principal objectives are to ensure a stable market for the b of its members and to maximize the price that its members receive for their b. Taxpayer is a nonexempt subchapter T cooperative. Thus, among other things, Taxpayer is entitled to exclude or deduct distributions to its members that qualify as per-unit retain allocations and patronage dividends provided the requirements of subchapter T of the Code are met.

Taxpayer incurred a loss for its fiscal year ended December 31, 2013. Taxpayer anticipates that its consolidated taxable loss for that year will be approximately a. Of this loss, approximately a is attributable to patronage business, and approximately a is attributable to nonmember/nonpatronage business.

For patronage dividend computation purposes, Taxpayer historically accounted for its operations using a single allocation unit. Several years ago Taxpayer established a special allocation unit for its a related to b marketed through Joint Venture. Taxpayer has two allocation units, a general allocation unit and a special allocation unit.

Most b marketing activities are accounted for in the general allocation unit, with the special allocation unit reserved for b marketed through Joint Venture. The patronage net earnings of each allocation unit are allocated among members based upon the quantity of b (measured in a) marketed through the unit. When the special allocation unit was established, Taxpayer adopted the policy of not

netting losses between the general allocation unit and the special allocation unit, and that policy continues in effect today.¹

The 2013 loss relates to Taxpayer's general allocation unit. The special allocation unit had net earnings in 2013.

Taxpayer anticipates that it will make an election pursuant to section 172(b)(3) of the Code to relinquish the entire carryback period with respect to the 2013 loss. Thus, for tax purposes, the 2013 loss will be available to carryover to 2014 and later years.

As a cooperative, Taxpayer distributes its net earnings from business done with or for member patrons to those patrons in the form of patronage dividends. Section 6.1 of Taxpayer's Bylaws provides, in pertinent part:

"6.1. Obligation to Allocate Net Earnings. The Association will at all times be operated on a cooperative basis for the benefit of its members. The Association is obligated to allocate annually as provided in this Article on a patronage basis to member patrons and nonmember patrons with whom an agreement has been entered into, all net earnings realized from business done with or for such patrons. Net earnings will be determined by deducting from the Association's gross receipts on such business the related costs, including the cost of all products and services, the expense of handling all products and services, the general operating and administration expenses of the Association, including any reserves for expenses and an appropriate share of dividends paid to the holders of the Association's preferred equity capital...."

In the event that Taxpayer incurs a loss in a year, Section 6.5 of Taxpayer's Bylaws provides the Board of Directors broad authority to adopt a plan for handling losses incurred for any fiscal year so long as that plan is "equitable and practical." That section provides:

"6.5. Losses. In the event the Association sustains a loss for any fiscal year, the Association may, at the discretion of the Board, account for such loss in any manner which it determines to be equitable and practical, including (a) offsetting such loss against unallocated reserves or surplus; (b) carrying such loss forward to be offset against future additions to unallocated reserves or surplus; (c) apportioning such loss among the patrons participating in such loss year on an equitable basis and recouping the amount due from each patron by offsetting it, in whole or in part, against the capital account balances of those patrons or against patronage due such patrons in future years; or (d) doing some combination of the foregoing. Notwithstanding anything in these Bylaws to the

1. Cooperatives are permitted by section 1388(j) of the Code either to net patronage losses between allocation units or not. Taxpayer has chosen not to do so in this case.

contrary, in the event of a deficit in unallocated surplus, the Board may set aside patronage sourced earnings in order to eliminate such deficit.”

Taxpayer had a deficit in unallocated surplus for financial statement purpose of approximately _____ at December 31, 2013, largely as a result of the _____ that gave rise to the 2013 tax loss.

Taxpayer’s Board of Directors is contemplating adopting the following plan for handling the 2013 loss (the “Loss Recovery Plan”):

1. The net operating loss as reported on Taxpayer’s 2013 consolidated federal income tax return (the “2013 loss”) will be divided into its component parts: (a) the general allocation unit patronage loss, and (b) the nonmember/nonpatronage loss.
2. The nonmember/nonpatronage net operating loss will be carried forward and offset against future nonmember/nonpatronage income until recovered.
3. The general allocation unit patronage loss will be recovered by retaining (and not allocating) a portion of future general allocation unit patronage earnings over a period of _____ years. The amount to be retained out of general allocation unit patronage earnings each year (prior to the payment of patronage dividends out of any remaining patronage earnings) will be determined as follows:

The amount to be retained out of general allocation unit patronage earnings each year will be (i) the “recovery amount” (as defined below), plus (ii) net patronage gains from the sale or other disposition of assets (including interests in corporations, partnerships, limited liability companies, or other business entities), plus (iii) such other patronage earnings not arising in the ordinary course of business as shall be determined by the Board of Directors to be earnings which appropriately should be retained as part of the Loss Recovery Plan.

In the event that general allocation unit patronage earnings for a year shall be redetermined after Taxpayer’s federal income tax return for the year has been filed, any resulting increase in patronage earnings shall be retained as part of the Loss Recovery Plan.

Initially, the “recovery amount” shall be an amount equal to _____ of the 2013 general allocation unit patronage loss.

In any year where more or less than the “recovery amount” for the year is retained out of patronage earnings, the “recovery amount” for subsequent years shall be adjusted by dividing the remaining unrecovered 2013 general allocation unit patronage loss by the remaining number of years in the _____-year recovery period.

After retaining amounts as provided above pursuant to this Loss Recovery Plan, any remaining general allocation unit patronage earnings each year will be available for distribution as patronage dividends to members marketing b through the general allocation unit.

On Taxpayer's federal income tax returns, the 2013 general allocation unit patronage loss carryover will be used as provided in section 172 against net patronage income (after deducting or excluding per-unit retain allocations and patronage dividends) reported on the tax returns (or as subsequently adjusted). The 2013 nonmember/nonpatronage loss will be used as provided in section 172 against nonmember/nonpatronage income reported on the tax returns (or as subsequently adjusted).

Taxpayer had a deficit in unallocated surplus for financial reporting purposes of approximately million at December 31, 2013. Taxpayer anticipates that amounts retained under the Loss Recovery Plan will be reflected as reductions to the deficit in unallocated surplus for financial reporting purposes. Using an example provided by Taxpayer, at the end of 2017, the deficit in unallocated surplus would have been reduced by (i) the amount of any recoveries in 2014, 2015, 2016 and 2017 related to the nonmember/nonpatronage portion of the loss and (ii) by the million recovered out of patronage income during those years pursuant to the Loss Recovery Plan.

Rulings Requested

1. After electing to relinquish its entire carryback period with respect to the 2013 loss, Taxpayer may carry its 2013 patronage loss forward in accordance with the provisions of section 172 of the Code to be offset against otherwise taxable patronage income earned in 2014 and subsequent years.
2. For 2014 and subsequent years, after retaining the amounts specified in the Loss Recovery Plan, any remaining patronage earnings of the general allocation unit will be available for distribution to members as patronage dividends excludable or deductible under section 1382(b) of the Code.
3. Any carryover of the 2013 general allocation unit patronage loss will not result in a recomputation of Taxpayer's patronage dividend exclusion or deduction in carryover years for the purposes of determining the amount of the loss remaining to be carried to subsequent years under section 172(b)(2) of the Code.
4. After electing to relinquish its entire carryback period with respect to the 2013 loss, Taxpayer may carry its 2013 nonmember/nonpatronage loss forward in accordance with the provisions of section 172 of the Code to be offset against taxable nonmember/nonpatronage income earned in 2014 and subsequent years.

5. The Loss Recovery Plan for handling Taxpayer's 2013 net operating loss is consistent with "operating on a cooperative basis" as that term is used in section 1381(a)(2) of the Code.

Section 172(a) of the Code allows a deduction for the taxable year equal to the aggregate of (1) the net operating loss ("NOL") carryovers to such years, plus (2) the NOL carrybacks to such year. With certain modifications, section 172(c) defines a NOL as the excess of the deductions allowed by Chapter 1 of the Code over the gross income. Section 172(b)(1)(A) generally provides that a NOL for any taxable year is carried back to each of the 2 taxable years preceding the taxable year of the loss and carried forward to each of the 20 taxable years following the year of the loss.

Section 172(b)(2) of the Code provides that the entire amount of the NOL for any taxable year must be carried to the earliest taxable year for which such loss may be carried under section 172(b)(1). The portion of such loss that may be carried to each of the other taxable years is the excess, if any, of the amount of such loss over the sum of the taxable income (computed in accordance with the modifications set forth in section 172) for each of the prior taxable years to which such loss may be carried.

Section 172(b)(3) of the Code provides that any taxpayer entitled to a carryback period for a NOL may elect to relinquish the carryback period. Such an election must be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the NOL for which the election is to be in effect. Such election, once made for any taxable year, is irrevocable for that taxable year.

Section 1382(b)(1) of the Code provides that in determining the taxable income of an organization to which this part applies, there shall not be taken into account amounts paid during the payment period for the taxable year (1) as patronage dividends (as defined in section 1388(a)), to the extent paid in money, qualified written notices of allocation (as defined in section 1388(c)), or other property (except nonqualified written notices of allocation (as defined in section 1388(d)) with respect to patronage occurring during such taxable year.

Section 1388(a) of the Code defines the term "patronage dividend" as an amount paid to a patron by an organization to which part I of this subchapter applies (1) on the basis of quantity or value of business done with or for such patron, (2) under an obligation of such organization to pay such amount, which obligation existed before the organization received the amount so paid, and (3) which is determined by reference to the net earnings of the organization from business done with or for its patrons.

In Rev. Rul. 65-106, 1965-1 C.B. 126, the Service addressed the inter-play between the net operating loss deduction and the patronage dividend deduction, asking "whether the net earnings of a taxable year available for payment of patronage

dividends must be reduced by the allowance of a net operating loss deduction.” The ruling concluded that they did not:

“The net operating loss deduction allowed under section 172(a) of the Internal Revenue Code of 1954 does not reduce a cooperative’s earnings in the year of such deduction.... Therefore, the earnings of the cooperative available for payment of patronage dividends, the payment of which is treated as a deduction under section 1382(b) of the Code, are not affected by the net operating loss deduction. Similarly, since 172(b)(2) of the Code does not limit the patronage dividends deduction in any way, the amount of patronage dividends treated as a deduction is not required to be recomputed for any year to which a net operating loss may be carried in determining, under that section, the portion of such loss that remains to be carried to other taxable years.”

This conclusion was subject to the following qualification:

“While the loss of one year does not affect the earnings of another, the contract between the cooperative and its members, or the bylaws of the cooperative, etc., may contain a provision concerning losses that could affect the amount of patronage dividends such a cooperative is obligated to pay in taxable years following the year a net operating loss is incurred. See Section 1388(a)(2) of the Code.”

Rev. Rul. 65-106 permits a cooperative and its members to determine the impact on a net operating loss on the patronage dividends to be paid in subsequent years. It provides that a loss will have no impact on future earnings of the cooperative available to be distributed as patronage dividends, except to the extent otherwise provided. Thus, it establishes a rule governing the relationship of the section 172(a) net operating loss deduction and the section 1382(b)(1) patronage dividend deduction.

The courts have recognized that it is left to a cooperative to determine how to recover patronage losses. In Associated Milk Producers, Inc. v. Commissioner, 68 T.C. 729 (1977), the Tax Court observed: “We fail to see any legitimate interest of respondent in the mechanics of petitioner’s allocation of losses among its past, current, or future member-patrons.” In Ford-Iroquois FS, Inc. v. Commissioner, 74 T.C. 1213 (1980), the Tax Court reiterated that conclusion: “The allocation of losses among a cooperative’s past, continuing, and future members is properly the concern of the membership and its board of directors.”

In Farm Service Cooperative v. United States, 619 F.2d 718 (8th Cir. 1980), the Eighth Circuit Court of Appeals cited with approval the Tax Court’s conclusions with respect to patronage losses in Associated Milk Producers, and then observed:

“Cf. Rev. Rul. 65-106, 1965-1 C.B. 126 (cooperative can choose which year’s patronage income to offset with a patronage loss).” (emphasis added).

This reference to Rev. Rul. 65-106 and short description of the ruling followed the discussion of that ruling contained in the Government’s brief:

“Rev. Rul. 65-106, *supra*, merely holds that a cooperative has a choice as to which year’s patron income to offset with a patron loss, and need not necessarily offset a current patron loss against the following year’s patron income.” (emphasis added).

According to Taxpayer, this ruling request presents two separate but inter-related questions. First, what impact will the 2013 loss have upon Taxpayer’s patronage dividends after the adoption of the Loss Recovery Plan? Second, how can Taxpayer use the NOL carryover resulting from the 2013 loss?

The Loss Recovery Plan’s focus is upon establishing how the 2013 loss will be recovered by holding back a portion of general allocation unit patronage earnings over a -year period, thus reducing the patronage dividends paid. This will result in unallocated general allocation patronage earnings in future years, which absent the 2013 NOL carryover would be subject to tax.

Taxpayer plans to split its loss for 2013 between the portion of the loss that is patronage and the portion of the loss that is nonmember/nonpatronage. It plans to waive its right to carry either portion of the 2013 loss back to 2011 and 2012 pursuant to section 172(b)(3) of the Code. Applying the rules of section 172, Taxpayer plans to carry the 2013 patronage NOL over against any unallocated (and therefore taxable) patronage earnings it may have in future years until the NOL is fully used (or expires at the end of twenty years). Similarly, applying the rules of section 172, Taxpayer plans to carry the 2013 nonmember/nonpatronage NOL over against any nonmember/nonpatronage earnings it may have in future years until that portion of the loss is fully used (or expires at the end of twenty years).

Ruling Request #1

At one time the Service took the position that cooperatives could not incur losses with respect to their patronage activities and thus were not entitled to carry patronage loss back and forward under section 172 of the Code. In Associated Milk Producers, Inc., the Tax Court rejected this position:

“We consider respondent’s position herein not only contrary to the express provisions of section 172, but conceptually strained and lacking any fundamental policy support; in short, an unwarranted tinkering with the tax structure applicable to cooperatives. The deductions claimed are clearly authorized by section 172. There is nothing within that section or the regulations thereunder which indicates

that the net operating loss deduction is not applicable in the case of a cooperative subject to subchapter T. In fact, quite to the contrary, the utilization of the net operating loss deduction is clearly implicit in certain subsections of the Code and the Income Tax Regulations, and in various of respondent's rulings dealing with cooperatives."

Later, the Service took the position that cooperative losses were governed by section 277 of the Code, not section 172. That position was rejected by the Tax Court in Buckeye Countrymark, Inc. v. Commissioner, 103 T.C. 547 (1994). In AOD CC-1997-003 (May 5, 1997), the Service announced its acquiescence in Buckeye Countrymark observing:

"We will no longer take the position that nonexempt cooperatives subject to subchapter T of the Code are subject to the limitations of section 277 of the Code. Nonexempt cooperatives subject to subchapter T may avail themselves of loss carrybacks allowed by section 172 of the Code." (emphasis added).

Thus, the first requested ruling asks for confirmation that the patronage portion of the 2013 loss may be carried over pursuant to section 172 of the Code.

Ruling Request #2

Section 1388(a)(3) of the Code provides that a "patronage dividend" paid by a cooperative must, among other things, be "determined by reference to the net earnings of the organization from business done with or for its patrons." (emphasis added). Rev. Rul. 65-106 provides that:

"The net operating loss deduction allowed under section 172(a) of the Internal Revenue Code of 1954 does not reduce a cooperative's earnings in the year of such deduction.... Therefore, the earnings of the cooperative available for payment of patronage dividends, the payment of which is treated as a deduction under section 1382(b) of the Code, are not affected by the net operating loss deduction....

While the loss of one year does not affect the earnings of another, the contract between the cooperative and its members, or the bylaws of the cooperative, etc., may contain a provision concerning losses that could affect the amount of patronage dividends such a cooperative is obligated to pay in taxable years following the year a net operating loss is incurred."

The second ruling request asks for confirmation that the 2013 patronage loss will reduce "net earnings" available for distribution by Taxpayer as patronage refunds in future years only to the extent provided in the Loss Recovery Plan. That plan contemplates retaining a specified amount from general allocation unit earnings each

year over a -year period until the 2013 loss is recovered. Taxpayer asks for confirmation that any general allocation unit patronage net earnings in excess of those retained pursuant to the Loss Allocation Plan will be “net earnings” available for distribution as patronage dividends excludable or deductible under section 1382(b)(1) of the Code.

Ruling Request #3

After concluding that losses do not affect “net earnings” in subsequent years available for distribution as patronage dividend except to the extent provided by a cooperative, Rev. Rul. 65-106 addressed a second question, which was described in GCM 32919 (October 5, 1964) as follows:

“Whether the patronage dividends deduction is to be recomputed in determining under section 172(b)(2) the portion of a net operating loss carried to one taxable year which remains to be carried to other taxable years.”

Rev. Rul. 65-106 answered this question in the negative, confirming that the conclusion of the ruling was applicable not only for purposes of subchapter T of the Code, but also for section 172 purposes:

“Similarly, since 172(b)(2) of the Code does not limit the patronage dividends deduction in any way, the amount of patronage dividends treated as a deduction is not required to be recomputed for any year to which a net operating loss may be carried in determining, under that section, the portion of such loss that remains to be carried to other taxable years.”

The third ruling requests confirmation for this conclusion for Taxpayer and Taxpayer’s Loss Recovery Plan.

Ruling Request #4

At one time it was the position of the Service that a nonexempt subchapter T cooperative was required to net nonmember/nonpatronage losses against patronage income. Rev. Rul. 70-420, 1970-2 C.B. 64. This ruling was revoked by Rev. Rul. 74-377, 1974-2 C.B. 274, which concluded that a cooperative is not required to net nonmember/nonpatronage losses against patronage income. That ruling states:

“This net operating loss may be carried back and carried forward in accordance with section 172 to offset past or future income from business done with nonmembers to whom the cooperative has no obligation to return patronage dividends.”

Rev. Rul. 74-377 has been consistently interpreted by Courts and, Taxpayer believes that while netting is not required, it is permitted in the discretion of a cooperative, so that, for instance, if a cooperative retains patronage earnings to recoup a nonmember/nonpatronage loss, the nonmember/nonpatronage loss can be offset against such retained patronage earnings. See, e.g., Farm Service Cooperative v. Commissioner, *supra* at footnote 16, and Certified Grocers of California, Ltd. v. Commissioner, 88 T.C. 238 (1987), footnote 21.

Under the Loss Recovery Plan, Taxpayer has chosen not to net nonmember/nonpatronage losses against patronage income, but rather to carry the losses forward to be used against future nonmember/nonpatronage income. This approach is consistent with Rev. Rul. 74-377.

Ruling Request #5

Over the years, in connection with some of the disputes regarding the treatment of cooperative losses the Service has suggested that there might be some approaches for handling losses that are inconsistent with an organization's status as a nonexempt subchapter T cooperative. The fifth ruling requests confirmation that Taxpayer's Loss Recovery Plan is consistent with "operating on a cooperative basis."

The Loss Recovery Plan delays the time that the NOL will produce a tax benefit for Taxpayer and its members, and thus is not the optimal approach judged strictly from the perspective of minimizing the tax burden of Taxpayer and its members. If Taxpayer adopted a plan to recover the loss by withholding all future general allocation unit patronage income until the loss was recovered, and did not pay patronage dividends out of the general allocation unit until that occurred, it would use the loss sooner, minimizing the taxable income of Taxpayer and its members. Alternatively, if Taxpayer passed the loss through to members, by allocating the loss among members on a patronage basis and offsetting each member's allocated portion of the loss against the member's qualified written notices of allocation, the members would be able to benefit from the loss in the year of the pass-through, accelerating realization of a tax benefit from the loss.

However, while Taxpayer considered each of these alternatives, Taxpayer represents that it has rejected them because they present fairness and business issues. The 2013 loss is largely the result of payments made during 2013 in _____ of several _____. These _____ arose as a result of Taxpayer's b and b product marketing activities. The conduct that gave rise to the _____ in the _____ occurred over a period of years. The _____ itself has dragged on for many years.

In developing the Loss Recovery Plan, Taxpayer has sought to balance a number of considerations, some of the most important of which are:

Taxpayer believes that it is important to recover the amount of the loss by retaining future patronage earnings so that it can restore its balance sheet. That will allow Taxpayer to continue to fulfill its mission on behalf of its members. For this reason, simply passing the loss through to members is judged not desirable. Moreover, passing losses through to members of a cooperative is normally damaging to member relations. Cooperatives rarely choose that option.

Taxpayer and its Board of Directors are seeking to craft a loss recovery plan that is fair to members, past, present and future. Allocating the loss to past patrons and trying to recover that loss from them is not practical. It is not clear that past patrons benefited from the conduct that gave rise to the (let alone which patrons might have benefited and how much). Because of this, Taxpayer and its Board of Directors are contemplating recovering the loss out of future patronage earnings. Taxpayer does not believe that it is appropriate to hold back all general allocation unit patronage earnings and to pay no patronage dividends until the recovery is complete. That would burden members that patronize Taxpayer during the next few years with a disproportionate share of the loss recovery. Taxpayer believes that the fairest way to recover the loss is over a period of years, holding back a specified portion of general allocation unit patronage income each year and continuing to distribute the remainder as patronage dividends.

Taxpayer and its Board of Directors have sought to develop a plan that causes the least disruption to the business of its members or to Taxpayer's business. Holding back all general allocation unit patronage earnings until the loss is recovered would be potentially disruptive to the businesses of members who count on continued patronage dividends from Taxpayer. Such an approach might also place Taxpayer at a competitive disadvantage in the marketplace. This is another reason that Taxpayer and its Board of Directors are contemplating spreading the recovery over a period of years, holding back a specified portion of the general allocation unit patronage income each year, but distributing the remainder as patronage dividends.

Taxpayer believes that the Loss Recovery Plan is consistent with its status as a subchapter T cooperative.

Based on the foregoing we rule that:

1. After electing to relinquish its entire carryback period with respect to the 2013 loss, Taxpayer may carry its 2013 patronage loss forward in accordance with the provisions of section 172 of the Code to be offset against otherwise taxable patronage income earned in 2014 and subsequent years.
2. For 2014 and subsequent years, after retaining the amounts specified in the Loss Recovery Plan, any remaining patronage earnings of the general allocation unit will be

available for distribution to members as patronage dividends excludable or deductible under section 1382(b) of the Code.

3. Any carryover of the 2013 general allocation unit patronage loss will not result in a recomputation of Taxpayer's patronage dividend exclusion or deduction in carryover years for the purposes of determining the amount of the loss remaining to be carried to subsequent years under section 172(b)(2) of the Code.

4. After electing to relinquish its entire carryback period with respect to the 2013 loss, Taxpayer may carry its 2013 nonmember/nonpatronage loss forward in accordance with the provisions of section 172 of the Code to be offset against taxable nonmember/nonpatronage income earned in 2014 and subsequent years.

5. The Loss Recovery Plan for handling Taxpayer's 2013 net operating loss is consistent with "operating on a cooperative basis" as that term is used in section 1381(a)(2) of the Code.

No opinion is expressed or implied regarding the application of any other provision in the Code or regulations. This ruling is directed only to the taxpayer that requested it. Under section 6110(k)(3) of the Code it may not be used or cited as precedent. In accordance with a power of attorney filed with the request, a copy of the ruling is being sent to your authorized representative.

Sincerely yours,

Paul Handleman
Chief, Branch 5
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

cc :